United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7608

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FOR THE SECOND CIRCUIT

No. 76-7608

B P/S

In the Matter of

The Complaint of TUG HELEN B. MORAN, INC., as owner, and MORAN TOWING & TRANSPORTATION CO., INC., as chartered owner, of the Tug DIANA L. MORAN for exoneration from or limitation of liability,

Plaintiffs,

MORAN TOWING & TRANSPORTATION CO., INC.,

Plaintiff-Appellant,

STATE OF CONNECTICUT,

Claimant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT MORAN TOWING AND TRANSPORTATION CO., INC.

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Comment on the State's Issues

State's first issue says Tomlinson Bridge of "necessity" opened to an angle less than permit requirement. But the "necessity" was occasioned by State fault in constructing the bridge at variance with the permit. State cannot profit from its own original fault.

Standard of Review

The "clearly erroneous" standard does *not* protect the conclusion of no causation between the protruding leaf and the chock snagging the girder. Where the facts of negligence are undisputed—i.e., admitted deviation from approved plans—causation becomes a question of law. This was succinctly stated in *Martin K. Eby Construction Co.* v. *Neely*, 344 F.2d 482 (10 Cir. 1965), aff'd 386 U.S. 317 (1967):

> "Proximate cause is ordinarily a question of fact for the jury, but where the facts are undisputed, it becomes a question of law for the Court" (p. 486).

See also: *Armstrong* v. *Commerce Tankers Corp.*, 311 F. Supp. 1236 (S.D.N.Y. 1969) at pp. 1241-2; aff'd 423 F.2d 957 (2 Cir. 1970), cert. den. 400 U.S. 833 (1970).

POINT I

The failure to elevate to 82° was a contributing cause of the collision between the chock and the girder.

The cases cited in Point I of State's brief are clearly distinguishable.

In *Seaboard Airline R. Co.* v. *Pan American & Transport Co.*, 199 F.2d 761 (5 Cir. 1952), cert. den. 345 U.S. 909, the Court specifically found that the bridge was *not* an "unlawful structure" (p. 765). The Court went on to say:

> "* * * if the Bridge had been * * * an unlawful structure, * * *"

the bridge owner might be liable for half damages (p. 764). The Tomlinson Bridge, however, *was* an "unlawful" structure. Judge Lasker found:

> "The discrepancy between the approved plans for the bridge which specified that the leaves be elevated to an angle of 82 degrees and the bridge's actual capability of rising to only 65 degrees violates §9 of the Rivers and Harbors Act (33 U.S.C. §401) * * * " (106a).

The *Seaboard* decision therefore, far from assisting the State, supports four-square a finding of half damages against the State.

In *The Fort Fetterman* v. *South Carolina State Highway Department,* 177 F. Supp. 76, 278 F.2d 921 (4 Cir. 1960), cert. den. 364 U.S. 910 (1960), the Court found that the bridge was a *lawful* structure (p. 925). More significantly the Court found:

> "In any event, the fact that the bridge was elevated to 71° instead of 80° or 82° could not with any reasonable possibility have caused or contributed to the collision or to the damages resulting therefrom. These damages would have been sustained whether the bridge had been elevated 61°, 71°, 80° or 82° " (p. 926).

The Tomlinson Bridge, however, was an *unlawful* structure. Moreover, the failure of the Tomlinson Bridge to elevate to 82° *did* contribute to the collision, because *but for* the protrusion over the channel the leaf could not have been snagged.

We have already distinguished *In Re Great Lakes Towing Co.,* 348 F. Supp. 549 (N.D. Ill. 1972), aff'd 505 F.2d

579 (7 Cir. 1974) (Appellant's brief—pp. 8-9). That bridge was exonerated because the ship, when it hit the girder, was "outside the protected channel" (p. 585). Since the BECRAFT flotilla was *inside* the "protected channel", the case is not in point—or if it is, it stands for the proposition that the State is contributorily at fault.

In *Dow Chemical Co.* v. *Dixie Carriers, Inc.*, 330 F. Supp. 1304 (S.D. Tex. 1971), aff'd 463 F. 2d 120 (5 Cir. 1972), the Circuit Court found that:

> "* * * there is no proof in the record here that the fender system actually *obstructed navigation,* that it was *inherently hazardous,* or that any *change in its* design or *placement* would have prevented the collisions" (p. 122; italics ours).

But Moran proved these points to the hilt. The Tomlinson Bridge *did obstruct* navigation; with leaves protruding over the navigable channel it *was inherently hazardous;* and a *change in its placement* (i.e., 82° elevation) would have prevented the collision. This case again fully supports a finding of contributory State fault.

In *Webb* v. *Davis,* 236 F.2d 90 (4 Cir. 1956), (quotation p. 7 of State's brief) the DEWEY, with no one in her pilot house, rammed and sank the DIXIE B. The DEWEY's navigation, "fool-hardy" and "inexplicable", could not have been "anticipated" (p. 93). The DIXIE B had failed to blow a signal but the Court found that a whistle would have been useless because there was no one in the DEWEY's wheelhouse to hear it (p. 93). This satisfied the *Pennsylvania* Rule requirement and the Court then applied the major-minor fault doctrine to free the DIXIE B. The deci-

sion, however, is wide of the mark since, here, the State cannot satisfy the *Pennsylvania* Rule burden because the leaf was a *but-for* cause. And major-minor is moot now that we have proportionate fault.

Beaufort and Morehead R. Co. v. *Damyank,* 122 F. Supp. 82 (D.C. N.C. 1954) involved a bridge with a fender missing in *one* area and a barge which struck the bridge in *another* area. The Court found that the missing fender:

> "* * * had nothing whatsoever to do with the infliction of damages" (p. 84).

The failure of the Tomlinson Bridge to elevate to 82° had *everything* to do with the infliction of damages. A non-protruding leaf could not inflict any damages.

In *Spokane P & S Ry Co.* v. *The Fairport,* 116 F. Supp. 549 (D.C. Ore. 1953), the Court found it "difficult" (p. 553) to understand in what manner the bridge was said to have been at fault, made "no determination" (p. 553) whether there was a statutory violation and then assumed that, even if there were, it was non-contributing. This is hardly a persuasive authority. Indeed the opinion is "difficult" to understand.

Despite the statement in *The Aakre,* 122 F.2d 469 (2 Cir. 1941), cert. den. 314 U.S. 690 (1941) that the *Pennsylvania* Rule merely shifts "the burden of proof with regard to causality" (p. 474), this Court still requires the statutory offender to prove its fault "could not" have contributed to the casualty. *In Re Seaboard Shipping Corporation,* 449 F.2d 132, 136 (2 Cir. 1971), cert. den. 406 U.S. 949 (1972), reh. den. 408 U.S. 932 (1972); *Petition of Long,* 439 F.2d 109, 113 (2 Cir. 1971).

Matton Oil Transfer Corporation v. *The Greene,* 129 F. 2d 618 (2 Cir. 1942) and *The Bellhaven,* 72 F. 2d 206 (2 Cir. 1934) involved, in each case, one vessel navigating in violation of the narrow channel rule. In the former the vessel on the wrong side of the channel was held liable for statutory violation; in the latter she was not. In the latter case, however, the Court seemed inclined to exonerate the vessel violating the statute because of the crude attempt of the other ship to concoct a totally improbable story (p. 209).

Nor are the anchor cases in point. In *The Perseverance,* 63 F.2d 788 (2 Cir. 1933), cert. den. 289 U.S. 744, the moving vessel had "at least thirteen hundred feet" (p. 789) of clearance to avoid the anchored ship. In *The Randa,* 56 F. Supp. 508 (S.D. N.Y. 1944), the moving vessel, sighting the anchored ship a mile away, proceeded too close, dropped her own anchor, and collided with the first ship. In each of these, there was an abundance of clear water for the moving vessel—hundreds of feet—hence the cases bear no relation to passage through Tomlinson draw with a mere 35′ maximum clearance on either side of the BECRAFT.

United States v. *De Vane,* 306 F.2d 182 (5 Cir. 1962) is a curious case where the Government's fault in calling off a rescue operation was held to supersede the decedent's fault in failing to properly heed weather warnings and to equip and lash his vessel and lifeboat. Nonetheless the case was remanded to determine whether the decedent's fault in drinking excessive quantities of salt water was a proximate cause of his death (p. 187). The case, to say the least, is somewhat perplexing on the issue of causation.

In any discussion of proximate cause Professor Prosser and his *Law of Torts* (4 Ed. 1971) is a good authority. The State's quotation from Prosser (Brief, p. 9) is somewhat truncated and placing a sentence on either side gives a better perspective of what Prosser said:

> "'Cause' and 'condition' still find occasional mention in the decisions; but the distinction is now almost entirely discredited. So far as it has any validity at all, it must refer to the type of case where the forces set in operation by the defendant have come to rest in a position of apparent safety, and some new force intervenes. But even in such cases, it is not the distinction between 'cause' and 'condition' which is important, but the nature of the risk and the character of the intervening cause" (p. 248).

The question is really one of intervening cause. Prosser notes (pp. 272-4) that a *foreseeable* intervening cause does not absolve the original wrong-doer from liability—and that even negligent conduct *is* a *foreseeable* cause. Applying this analysis, it was certainly foreseeable that a barge, transiting this narrow draw, might get off center permitting a deck projection to snag a leaf protruding over the channel. After all, barges are unwieldy craft, not easy to control, and not immediately responsive to actions of the towing tugs. *Southern Transp. Co.* v. *Philadelphia B & W R*

Co., 196 Fed. 548, 550 (D.C. Md. 1912), aff'd, 205 Fed. 732 (4 Cir. 1913). Since negligent navigation was *foreseeable* and since the protruding leaf increased the *risk* of collision, the State's negligence was a *cause* of the collision with the leaf. The language of the Court in *Transcontinental Gas Pipe L. Corp.* v. *Mobil Drill. Barge*, 424 F.2d 684 (5 Cir. 1970), cert. den. 400 U.S. 832 (1970), where the Court rejected a "condition not cause" argument, seems peculiarly appropriate:

> "A prior act of negligence is a proximate cause of an injury despite the occurrence of a second causative act when the second negligent act might reasonably have been expected to occur" (p. 689).

And also worthy of note is the statement in *In Re Dearborn Marine Service, Inc.*, 499 F.2d 263 (5 Cir. 1974), cert. dism. 423 U.S. 886 (1975), where, in refusing to follow "condition not a cause", the Court said:

> "We also reject Dearborn's contention that the CARRYBACK, by being moored too close to the platform, merely created a condition on which intervening negligent forces of others acted and was not itself a proximate cause of the deaths in issue. This theory of proximate causation, now almost universally rejected, in admiralty as elsewhere, is an argument 'grow[ing] out of the discredited notion that only the last wrongful act can be a cause—a notion as faulty in logic as it is wanting in fairness.' (Citations) The correct rule is that actionable negligence may consist of failure to take precautions against foreseeable acts of third persons, and this rule applies though the conduct of the third person is itself negligent" (p. 279).

It begs the question to say that the leaves were in a position of "apparent safety". Permitting the leaves to overhang the channel created a risk of danger that the leaves would be struck by vessels passing through the draw. The risk materialized, and the State's fault in creating the risk is a proximate cause of the collision.

POINT II

The missing fenders contributed to the collision between the chock and the girder.

The testimony of Watkins and Warm was not incomplete. In the context of the questions, both simply said that even with good fenders the chock would strike the girder because the impact point was 2½′ on the channel side of the required fender line. In other words, with the barge in the channel, then moving sideways—to the left or east—the chock would reach the girder before the hull reached the fender. But neither was asked whether a proper fender would bounce the barge farther into the channel—hence their answers do not touch this point.

The State correctly says (Brief, p. 12) that there is no evidence concerning the "actual distance" the barge would have *bounced* had she contacted a fully repaired fender. But a fully repaired fender would be *48″* wide (59a-60a) and the barge needed to be only *3″* further to the right for the chock to pass under the girder (101a). The great disparity between the *48″* fender thickness and the needed *3″* is, on its face, more than sufficient to compensate for what the State describes (Brief, p. 12) as an "inherent cushioning factor" in a "yielding wooden fender". But query how "yielding" is the fender? Note the solid construction in

the photographs Exhs. 37, C-1, C-2, C-3 and C-6 (Joint Exh. Vol. E-14, E-20, E-21, E-22 and E-25) which portray a section of *sound* fender. Indeed the strength of the fender is further illustrated by surveyor Halboth's description in his survey report Exh. J (Joint Exh. Vol. E-30) at page E-32:

> "The fendering consists of approximately 8″ x 10″ wales, mounted over 12″ x 12″ posts, and sheathed on the channel side with 4″ x 10″ vertical timbers."

It is very difficult—indeed nigh impossible—to believe that a barge bouncing off that 48″ thick solid timber construction would not end up 3″ further to the right in the channel than would a barge bouncing off the stone abutment. If the starting point is 48″ further to the right, the end point surely would be at least 1/16 of that distance, or at least 3″ further to the right. No other finding is plausible.

However, because the missing fenders are a statutory fault, the *State* must prove their absence *could not* have caused the collision. Since the testimony of Warm and Watkins does not touch this point, the State has not met its burden.

The State errs in saying (Brief, p. 12) there is no evidence "that fenders on the abutment are intended to protect the leaves of the bridge." Beaudin and Warm both testified that fenders are to protect the "*bridge structure*":

> "Q. Mr. Beaudin, what is the purpose of a fender system on a bridge? A. To protect the *bridge structure,* the pier, the abutment and navigation" (86a, italics ours).

> Q. What is the purpose of a fender system at a bridge, Captain Warm? A. Well, to provide a safety factor for vessels passing through the opening of the bridge to keep the vessel clear of the *bridge structure*" (74a, italics ours).

This testimony was undisputed and fully supports a finding that these fenders were intended to protect the *bridge structure*—the leafs—which hung over the water.

POINT III

The judgment of the District Court should be reversed in part to hold the State of Connecticut liable for half damages resulting from the chock striking the girder.

Dated: New York, New York
March 18, 1977

Respectfully submitted,

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